[2025] JMCA Civ 13

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE LAING JA

SUPREME COURT CIVIL APPEAL COA2024CV00080

BETWEEN	**ONEIL EDWARDS**	**APPELLANT**
AND	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**RESPONDENT**

Written submissions filed by McNeil & McFarlane for the appellant

Written submissions filed by Livingston, Alexander & Levy for the respondent

30 May 2025

Civil Procedure – Application for relief from sanction – Failure to file and serve witness statements within time ordered pursuant to rule 29.11 of the Civil Procedure Rules, 2002 ('CPR') – Whether the application was made promptly pursuant to rule 26.8(1) of the CPR

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

F WILLIAMS JA

[1] I have read, in draft, the judgment of Foster-Pusey JA and agree with her reasoning and conclusion. I have nothing to add.

FOSTER-PUSEY JA

Introduction

[2] In this appeal, the appellant, Mr Oneil Edwards ('Mr Edwards'), seeks to set aside the decision of Master R Harris ('the learned Master') made on 6 June 2024, in which she refused Mr Edwards' application for relief from sanctions.

Proceedings in the court below

[3] On 6 April 2016, Mr Edwards filed a claim form and particulars of claim suing the respondent, the Jamaica Public Service Company Limited ('JPS'), for damages for negligence and/or breach of statutory duty. He asserted that after putting on the equipment provided by the company, climbing a utility pole to remove a wire in the course of his duties, and following the required procedure to descend from the utility pole, the spurs from his shoes "tripped out". As a result, he fell to the ground and suffered severe injuries, loss, damage, and incurred expenses.

[4] Mr Edwards pleaded that the accident was due to, among other things, JPS' failure to provide suitable or adequate equipment and to have a safe system of work. Mr Edwards' injuries included a Schatzker type 11 fracture of the proximal right tibia and a pilon type fracture of the distal left tibia. He had to undergo surgery and physiotherapy and was left with a disability.

[5] A default judgment followed, and a notice of assessment of damages was issued. JPS successfully applied to set aside the default judgment on 16 March 2017 and filed a defence on the same day. JPS denied liability, asserting that, among other things, it operated a safe system of work, provided its employees with adequate safety equipment and provided sufficient training and instruction to its employees for the tasks to which they were assigned. The company also pleaded that Mr Edwards was contributorily negligent.

[6] While a case management conference was scheduled for 9 October 2018, there is nothing on the record of appeal indicating what took place on that day.

[7] On 12 March 2019, the learned Master conducted a case management conference. She made various orders for standard disclosure and inspection of documents, filing and exchanging witness statements on or before 8 March 2022, and holding a pre-trial review on 6 February 2023.

[8] On 13 June 2022, JPS filed an application for relief from sanctions and an extension of time to file its witness statements.

[9] The attorneys-at-law for Mr Edwards filed the witness statements of Kirth Lewis and Raymond Garwood on 25 October 2022.

[10] On 3 February 2023, the attorneys-at-law for Mr Edwards applied for relief from sanctions and for an extension of time to file witness statements, a list of documents, and a listing questionnaire. In the application, Mr Edwards asked that the witness statements filed 25 October 2022, the list of documents filed 25 July 2022, and the listing questionnaire filed 12 January 2023 be allowed to stand as having been properly filed.

[11] The pre-trial review was held as scheduled on 6 February 2023. The court made orders relating to consultation between the parties concerning documents to be included in the core bundle, the filing and exchanging of skeleton arguments, a chronology of events, and lists of authorities. The court ordered that any further applications be filed and served by 28 February 2023 for a hearing on 29 March 2023. On that date, the court also granted JPS' application for relief from sanctions, ordering, among other things, that a witness summary filed 17 January 2023 would stand as having been filed in time and that time was extended for JPS to file and serve its witness statements by 31 May 2023.

[12] On 29 March 2023, the court granted the application filed by Mr Edwards' attorneys-at-law on 3 February 2023.

[13] JPS filed witness statements by Sydney Williams on 30 May 2023. It also filed skeleton arguments on 13 October 2023 and a notice of intention to tender hearsay evidence on 10 November 2023.

[14] The attorneys-at-law for Mr Edwards filed submissions and a list of authorities on his behalf on 13 November 2023. Significantly, they filed Mr Edwards' witness statement dated 3 March 2022, on 27 November 2023. On that same day, they filed an amended notice of application for relief from sanctions and seeking an extension of time to file Mr Edwards' witness statement, the skeleton arguments, chronology of events and list of authorities on or before 13 October 2023. However, para. 2 of the application asked the court to allow Mr Edwards' witness statement filed 27 November 2023 and all the other documents to be allowed to stand as having been filed in time.

[15] The grounds of the application included:

> "4. That the Witness Statement of the Claimant Oneil Edwards was prior to the Witness Statements of Raymond Garwood and Keith Lewis but by inadvertence the Witness [sic] of the Claimant was placed in an envelope by the Attorney having conduct of the matter Ms Rechella McNeil who is no longer with the firm.
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> 5. That [sic][it] was in preparing all the bundles last week that it was observed that although the two other Witness Statements had being [sic] filed and served the Claimant [sic] witness [sic] was not filed or served.
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> 6. There is a good explanation for the failure to comply with the Orders.
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> 7. The Claimant has complied with the orders.
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> 8. The Claimant has generally complied with all other relevant rules, practice directions, orders and direction.
>
> 9. …..
>
> 10. That there will be no detriment suffered by the granting of any Order as the Defendants have themselves failed to comply with any [sic] of the Orders made.
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> 11. That there is sufficient time prior to the Trial date in December 2023, so the Trial will not be affected.
>
> 12. …."

[16] Mr Edward's attorney-at-law, Ms Carleen McFarlane, swore an affidavit supporting the application. Ms McFarlane outlined background information to the application, including that Mr Edwards migrated to the United States in or around 2016 and that he underwent treatment locally and overseas. As he was continuing medical treatment, it was intended that he provide further receipts and reports by the time the matter came up for case management. That did not occur. Mr Edwards, however, came to Jamaica in 2017 and met with one of his doctors. He was not able to afford the medical assessment at the time. He returned to the United States, where he ran into further financial difficulties due to ongoing medical expenses arising from his injuries as well as his inability to work to his full capacity. As a result, the attorneys-at-law did not receive a medical report from Dr Jones in time for the pre-trial review. Ms McFarlane provided explanations relating to other medical reports and invoices ranging from 2020 up to November 2023, as Mr Edwards was still receiving treatment and undergoing reviews.

[17] Counsel also stated:

> "16. That regrettably the Pre-Trial Review was set from early February 2023, which was approximately 10 months prior to the Trial date and several medical visits and treatments have taken place since, in relation to the Claimant, and we were awaiting additional information following his medical visits.
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> 17. That the Witness Statement of the Claimant Oneil Edwards was prepared prior to the Witness Statement of the other two (2) witnesses Raymond Garwood and Keith Lewis, but by inadvertence the Witness Statement of the Claimant was placed in an envelope, by the Attorney-at-law having conduct of the case Ms Rechella McNeil and was not filed along with the other Two (2) witness statements.
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> 18. That in preparing the bundles last week that [sic] it was observed that the other two (2) Witness Statements had been filed and served and that the Witness Statement of the Claimant was not filed or served.
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> 19. That the Claimant had sworn to an Affidavit herein in which he had set out in details [sic] how the injury was sustained. Copy of which Affidavit is exhibited hereto.

> 20. That the Defendant will not suffer any major detriment, by the amendments being granted and is in fact just and in keeping with the objective if the Orders are and if not the Claimant will suffer financial loss.
>
> 21. That the contents of the witness statement have been previously captured in the Affidavit of the Claimant and in the Particulars of Claim."

[18] In a supplemental affidavit, filed 29 November 2023, Ms McFarlane expanded on the circumstances relating to when Mr Edwards' witness statement was filed and served. Counsel stated that Mr Edwards' witness statement filed on 27 November 2023 was served on JPS' counsel by email at 4:28 pm and the hard copy served on 28 November 2023. In what appears to be an error, counsel stated that the witness statement was prepared on 3 March 2023. This is in contrast with the signed copy of the witness statement that bears a date of 3 March 2022. Ms McFarlane stated that Ms Rechella Neil prepared the witness statement within the time ordered for filing of witness statements at the case management conference held on 12 March 2019. Counsel continued:

> "5. That by inadvertence the Witness Statement was placed in an envelope for the purpose of being filed at the Court Registry and for Notice of the filing to be given to the Defendant pursuant to the Civil Procedure Rules 29.7 since the Defendant had not filed their Witness Statement and had not filed a Witness Summary.
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> 6. That unfortunately Ms Rechella McNeil migrated overseas and the presence of the Witness Statement still on the file was not ascertained until the Bundles were being prepared for filing when it was discovered that the Claimant [sic] Witness Statement was not filed or served.
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> 7. That the Witness Statement was thereafter filed on the 27th day of November 2023 within three (3) days of the discovery, and was done in a timely manner.
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> 8. That this was after two (2) applications for extension of time and relief from sanction had been filed on the Claimant's behalf related to two (2) supporting witnesses and two (2) by the Defendants [sic].

9. That the Claimant has a very good reason for not making an application previously pursuant to 26.8 of the Civil Procedure Rules (2002) in that the Attorney-at-Law having conduct of the file had never brought it to anyone's attention that his Witness Statement had been prepared in time and placed on the file and the delay was not intentional or likely to cause detriment to the Defendant.

10. That the Attorney-at-Law left for overseas without completing a total handover of all the files under her control.

11. That the Claimant has a very strong case in which there is much merit and acted in a timely manner as soon as it was discovered the Witness Statement had not been filed by filing same at the first opportunity, and the delay was not intentional...."

[19] Mr Edwards also swore an affidavit in support of the notice of application. This affidavit was filed 19 December 2023. That affidavit mainly addressed the request for Dr Jones, a consultant orthopaedic surgeon to be appointed as an expert witness in the trial. Attached to the affidavit were medical reports from Dr Jones dated 20 January 2015, 28 September 2015, 18 May 2017, and 6 December 2023. The affidavits included impairment ratings and projected costs for possible future surgery for Mr Edwards.

[20] JPS filed submissions opposing Mr Edwards' application.

[21] On 11 June 2024, the learned Master heard and determined the notice of application. The learned Master granted an extension of time for Mr Edwards to file skeleton arguments, submissions, and a list of authorities on or before 13 November 2023 and ordered that all documents filed on or before November 2023 be permitted to stand as having been properly filed and served. She refused Mr Edwards' application for relief from sanctions, granted leave to appeal, and set a pre-trial review for 2 October 2024.

The appeal

[22] In the notice and grounds of appeal, filed on 24 June 2024, the appellant challenged the exercise of the learned Master's discretion on the following grounds:

> "1. The learned Master erred in failing to give due regard to the fact that prior to the application being placed before her for consideration, the trial date had previously been vacated, deferred until 2027 (Four (4) years later) and cost orders [sic] already been imposed on the [appellant] for the deferral of the trial.
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> 2. The learned trial judge [sic] erred in her determination/conclusion that the application for relief from sanctions was not made promptly.
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> 3. The learned Master failed, neglected and or refused to fully evaluate the issue of prejudice or balance the interest of justice given the circumstances surrounding the application before her for consideration namely by disregarding that:
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> a. On similar grounds, the [respondent] (on their application had previously been granted relief from sanctions and permitted to file their witness statements out of time only months prior to the first trial date;
>
> b. [The appellant's] application for relief from sanctions was determined approximately [sic] months before the actual trial dates in 2027;
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> c. The [appellant] had generally been compliant with the orders of the Court and was entitled to have his case determined on the merit of the evidence given the span of time before the trial dates of 2027;
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> d. Compliance with the filing of the Witness Statements for other witnesses for the [appellant] betrayed the sincerity of the persuasion of the [appellant] and/or his Attorneys-at-law that the [appellant's] witness statement had already been filed.

That omission was made by the [appellant's] Attorneys-at-law did not warrant the application of such a draconian sanction that effectively excludes the [appellant's] evidence and defeats the advancement of his case.

4. The learned trial judge [sic] failed to give any or any [sic] proper consideration to the overriding objectives of the court as set out in Rule 1.1 of the Civil Procedures Rules in the circumstances where there were alternatives to allow the case to be dealt with justly, one of which included wasted cost/costs."

The orders sought were as follows:

"1. An order that the decision of Master Justice [sic] R. Harris be set aside in its entirety and the [appellant's] Witness Statement be allowed to stand and Relief granted.

2. An order that the [appellant's] Witness Statement be relied on at trial.

3. Costs to be as cost [sic] in the cause.

4. Further, for such other relief as may be appropriate or just in the circumstances."

The appellant's submissions

[23] On the question as to whether the application for relief from sanctions was made promptly, the appellant argued that the learned Master's conclusion lacked "a nuanced understanding of the specific circumstances and complexities" inherent in the case. Counsel argued that the relevant authorities indicate that promptness is subjective and must be determined contextually. Counsel also submitted that the court should have considered the actions and conduct of both parties, as well as the fact that the application was made several years before the trial date in 2027. Counsel urged that when construing 'promptness', time should run from when it became known that something was not done in accordance with the court's orders, and highlighted that within days of discovering the non-compliance, an application was filed for relief from sanctions.

The respondent's submissions

[24] Counsel for the respondent asserted that the court should assess promptitude from when the witness statement should have been filed, which was 8 March 2022. Counsel also asserted that since Ms McFarlane took charge of the file in February 2023, she should have thoroughly reviewed it. Consequently, the application for relief from sanction was filed almost one year and nine months after the appellant's witness statement ought to have been filed, and this could not have been seen as prompt.

Discussion

[25] In this appeal, this court will review the exercise of discretion by the learned Master. In **The Attorney General of Jamaica v MacKay** [2012] JMCA App 1, Morrison JA (as he then was) succinctly outlined the parameters within which we do so. At paras. [19] and [20], he wrote:

> "[19] It is common ground that the proposed appeal in this case will be an appeal from Anderson J's exercise of the discretion given to him by rule 13.3(1) of the CPR to set aside a default judgment in the circumstances set out in the rule. It follows from this that the proposed appeal will naturally attract Lord Diplock's well-known caution in **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042, 1046 (which, although originally given in the context of an appeal from the grant of an interlocutory injunction, has since been taken to be of general application):
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> > '[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently.'
>
> [20] This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground

> that no judge regardful of his duty to act judicially could have reached it'."

[26] This court does not have the benefit of the learned Master's reasons. However, the parties appear to agree that the learned Master concluded that the application was not made promptly. The authorities indicate that once this determination is made, the application for relief from sanction cannot succeed. Was this an appropriate assessment of the circumstances? I will consider this issue further on in the judgment.

[27] Importantly, it is noteworthy that the complete chronology and various orders made relating to the matter are not before this court. The appellant, for example, refers to orders that are not before this court.

[28] Rule 29.11 of the CPR provides that where a witness statement or summary is not served within the time specified by the court, the witness may not be called unless the court permits this. Furthermore, the court may not grant that permission at trial unless the party requesting permission provides a good reason for not having previously sought relief under rule 26.8 of the CPR.

[29] In **Oneil Carter and others v Trevor South and others** [2020] JMCA Civ 54 ('**Oneil Carter**'), this court noted that a defaulting party under rule 29.11 must apply for and receive relief from sanctions under rule 26.8 to avoid the sanction imposed by rule 29.11. That sanction remains in effect until a successful application for relief from the sanction is made (see paras. [34], [35] and [38]). In **Oneil Carter**, the respondents had not applied for relief from sanctions resulting from their failure to file and serve their witness statements in time. The judge at first instance had, in error, granted the respondents an extension of time to file and serve witness statements on an oral application for extension of time. This court made it clear that the lower court's general case management powers are inapplicable in circumstances where rule 29.11 of the CPR is operational (see para. [64]).

[30] A look at rule 26.8 and some of the cases from this court in which it was interpreted and applied will assist in determining the outcome of this matter.

[31] The relevant provisions of rule 26.8 appear below:

> "(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –
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> (a) made promptly; and
>
> (b) supported by evidence on affidavit.
>
> (2) The court may grant relief only if it is satisfied that –
>
> (a) the failure to comply was not intentional;
>
> (b) there is a good explanation for the failure; and
>
> (c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.
>
> (3) In considering whether to grant relief, the court must have regard to –
>
> (a) the interests of the administration of justice;
>
> (b) whether the failure to comply was due to the party or the party's attorney-at-law;
>
> (c) whether the failure to comply has been or can be remedied within a reasonable time;
>
> (d) whether the trial date or any likely trial date can still be met if relief is granted; and
>
> (e) the effect which the granting of relief or not would have on each party."

[32] In **HB Ramsay & Associates Ltd and others v Jamaica Redevelopment Foundation Inc and another** [2013] JMCA Civ 11 ('**HB Ramsay**'), the appellant challenged Fraser J's refusal to grant relief from sanctions. In that matter, the Master ordered the appellant to pay costs to the respondents. The appellants did not do so, and, on 13 April 2010, the Master made an order that, unless the costs were paid on or before 18 June 2010, the appellants' statement of case would stand as struck out. The appellants

did not comply and applied for relief from sanctions on 15 July 2010. In the appeal, this court considered whether the application was made promptly, whether a good explanation had been given for the failure, and whether the appellants had generally complied with other rules, orders, and directions.

[33] In examining the question as to whether the application was made promptly, Brooks JA (as he then was), noted that promptitude, in the context of rule 26.8(1) of the CPR appears to be a mandatory element, but the word 'promptly' has a measure of 'flexibility' in its application. Whether something has been promptly done or not depends on the circumstances of the case (see paras. [9] and [10]). In considering an argument by counsel that an assessment of whether an application was made promptly ought to take into account the time when the applicant discovered the default, Brooks JA found that that submission did not have much force:

> "[14]…in the context of a sanction that is applied pursuant to an 'unless order'. Where such orders are made, the party affected is given notice of the requirement and the penalty for non-compliance. The deadline for compliance should, therefore, be uppermost in his mind."

[34] Brooks JA noted that although the client paid the required funds to his attorneys-at-law two days before the deadline, his attorneys-at-law stated that the sums were not paid over as required due to inadvertence. Then, it took almost one month before the application for relief from sanctions was filed. Unsurprisingly, Brooks JA agreed with the judge at first instance that the application was not made promptly and, as a result, the application would fail. Like the judge at first instance, however, he went on to consider the other aspects of the requirements of rule 26.8.

[35] In **National Irrigation Commission Ltd v Conrad Gray and another** [2010] JMCA Civ 18 ('**National Irrigation**'), the appellant appealed from an order granting the respondents relief from sanctions. This court allowed the appeal. The respondents were ordered to give security for costs within 42 days of the order, failing which their claim would stand struck out. The 42 days expired on or about 21 July 2008, and the sum

ordered was not paid. The appellant requested that a final judgment be entered on 11 September 2008. On 11 December 2009, the respondents filed an application for relief from sanctions and for their claim to be restored. The application was granted by the judge below. Harrison JA, who wrote the reasons of the court, noted that the crucial issue for determination in the appeal was whether the respondents had acted promptly in compliance with rule 26.8(1) of the CPR when they sought relief from sanction. Harrison JA wrote at paras. [14]-[16]:

> "[14] The first stage, as Mr. Spence puts it, is for the court to consider whether or not the appellant's application seeking relief from sanctions was made promptly. Promptly is an ordinary English word which we would have thought had a plain and obvious meaning, but if we need to be told a bit more about what it means, we do have the authority of **Regency Rolls Limited v Carnall** [2000] EWCA Civ. 379, where Arden, L.J. pointed out that the dictionary meaning of 'promptly' was 'with alacrity'. Simon Brown, L.J. said:
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> > '**I would accordingly construe 'promptly' here to require, not that an applicant has been guilty of no needless delay whatever, but rather that he has acted with all reasonable celerity in the circumstances.'**
>
> [15] The issue here is whether the respondents did act with all reasonable celerity. The claim in this matter had been automatically struck out on 21 July 2008 yet it took the respondents some six (6) months before the application was made for relief from sanctions. In **Harrison v Hockey** [2007] All ER (D) 336 Mann, J. opined that a period of four-and-a-half months between judgment and an application under CPR 39.3 was likely to be too long in the vast majority of cases where an application under that provision was made. This is not a setting aside judgment situation but we do believe that similar principles in terms of time would be applicable to an application for relief from sanction.
>
> [16] In our judgment, the application plainly could, and reasonably should, have been issued well before it was done. Six months was altogether too long a delay before making this

> application. Promptness, in our view, is the controlling factor under rule 26.8. It is plainly a very important factor, as is evident from the fact that it is singled out in the rule as a matter to which the court must have regard. In our judgment, it is a very important factor because there is a strong public interest in the finality of litigation. Put simply, people are entitled to know where they stand." (Emphasis supplied)

[36] In **Price Waterhouse (A Firm) v HDX 9000 Inc** [2016] JMCA Civ 18 ('**Price Waterhouse**'), the respondent's claim was dismissed at first instance because it failed to comply with certain procedural orders. However, a judge later granted it relief from sanction and set aside the judgment entered in favour of the appellant. The appellant challenged that decision. At first instance, HDX was ordered to comply with certain orders made 9 May 2013 by 28 February 2014, failing which its claim would stand dismissed, and judgment entered for Price Waterhouse. HDX did not meet the deadlines, and on 28 February 2014, its claim stood dismissed.

[37] In July 2014, Price Waterhouse decided to act in respect of the unless orders and filed an application asking for the claim to be dismissed and judgment to be entered. The judge before whom the application came up ruled that the claim was already at an end and made no order on the application. On 25 September 2014, HDX filed an application for relief from sanctions, for which it received an October 2014 hearing date, but it did not serve the application. On 1 October 2014, Price Waterhouse received judgment in its favour. On 10 December 2014, HDX filed an amended application for relief from sanctions and served it on 22 December 2014. The judge who heard the application found that the application was not made promptly, but formed the view that the overriding objective established by the CPR required the grant of relief from sanction.

[38] In commenting on the statement made in **HB Ramsay** that there was some flexibility in the assessment of how promptly an application was made, Brooks JA stated that there could be an explanation for what "at first blush" seems to be delay. He noted that each case would turn on its own facts but emphasised that if the application was not made promptly and there is no application for extension of time, the application for relief

from sanction must fail (see para. [36]). Brooks JA stated that as the learned judge found that the application was not made promptly, he should not have considered the other aspects of rule 26.8. Brooks JA also noted that the examination of other factors by this court in the **HB Ramsay** case was only done because the judge below had done so, even after concluding that the application was not made promptly (see para. [28]). Price Waterhouse's appeal was therefore allowed, and judgment was entered in its favour.

[39] Neither party relied on this court's judgment in **Deputy Superintendent John Morris and others v Desmond Blair and another** [2023] JMCA Civ 45 ('**Deputy Superintendent John Morris**'), however, it is one of this court's recent judgments touching on the matter of the failure to serve witness statements and the requirement to apply for relief from sanctions pursuant to rule 26.8 of the CPR. At para. [67] of the judgment, P Williams JA accepted that what amounts to promptness will differ from case to case as the particular circumstances must be taken into account, and further said:

> "It is accepted that what amounts to promptness significantly depends upon the circumstances of the particular case (see **Meeks v Meeks**). **In this case, I find that the question of promptness was relative to the time the breach had taken place with the consequential sanction taking effect.** On 10 July 2020, the court ordered that the witness statements were to be filed and served on or before 8 January 2021. The sanction took effect on that date. The respondents did not file and serve the statements until 17 September 2021. **The application for relief from sanction was made on 2 December 2021, only after they had been served with the appellants' application that the statements be struck out.** It bears repeating that it was a significant admission by Miss Campbell that 'the application [was] being made at this stage as [the respondents] are now aware that the [appellants] are unwilling to settle the matter'. **The respondents were not purporting to say that they were unaware of the fact that they were in breach of the court's order. They accepted that the witness statements had been filed late, they, however, did not accept the need to apply for relief from sanction for so doing, until three months later, when it was clear that the settlement they were anticipating would not be**

> **realised.** In these circumstances, although the application can be viewed as having been made promptly in response to the application to strike out, to my mind, there was an inordinate delay in relation to when the breach had occurred. Thus, I find that the application for relief from sanction was not made promptly." (Emphasis supplied)

[40] I move to consider the issue more closely against the backdrop of the cases. In **HB Ramsay**, the appellant did not comply with an unless order. I note that Brooks JA considered an argument by counsel that an assessment of whether an application was made promptly should take into account the time when the applicant discovered the default. Brooks JA did not dismiss the possibility of such an approach, but indicated that the submission did not have much force in the context of a sanction applied pursuant to an unless order, when the deadline for compliance should be at the forefront of the litigant's mind and his attorney-at-law.

[41] **National Irrigation** also involved an unless order. There, the respondent waited six months after the sanction of the unless order before applying for relief from sanctions. Similarly, in **Price Waterhouse,** an unless order resulted in the claim standing dismissed on 28 February 2014, yet the amended application for relief from sanctions was not made until 10 December 2014 and served 22 December 2014, approximately 10 months later.

[42] An application for relief from sanctions, pursuant to rule 26.8, is usually made because a duty imposed by the court or the rules has not been fulfilled within the relevant timelines. So the circumstances usually involve some delay, but, nevertheless, the application for relief must be made promptly. As Arden LJ commented in **Regency Rolls Limited v Carnall**, it is not that the applicant has not been guilty of some delay, but the applicant must have "acted with all reasonable celerity in the circumstances". How does the court make this assessment? The court must consider the circumstances surrounding the timing of the application to determine whether it was made promptly.

[43] The case at bar involved a failure to file and serve witness statements within the time ordered at the case management conference. These timelines are important for the

timely progress of matters for trial. At the case management conference held in March 2019, the learned Master ordered that witness statements be filed and exchanged on or before 8 March 2022. The attorneys-at-law for Mr Edwards filed two witness statements on 25 October 2022, those of Kirth Lewis and Raymond Garwood. The copies in the record of appeal are incomplete, as they do not have the final page reflecting when the statements were signed. Mr Edwards' attorneys-at-law also filed their list of documents on 25 July 2022.

[44] Interestingly, Mr Edwards' witness statement is dated 3 March 2022, a date falling before the deadline of 8 March 2022 set by the court to file witness statements. In such circumstances, it is clear that counsel for Mr Edwards prepared his witness statement ahead of the court-imposed deadline.

[45] Unlike the circumstances in **Deputy Superintendent John Morris** where counsel knew that the time for filing witness statements had passed but held back on the filing of witness statements in the hope that the matter would be settled, in the case at bar, counsel did not realise that Mr Edwards' witness statement had not been filed. Further, within three days of counsel discovering the witness statement in an envelope on the file, counsel applied to the court for relief from sanctions so as to be able to rely on it at trial.

[46] Once counsel's version of events is believed, and we see no reason not to do so, the promptness of the application must, in these circumstances, be assessed in the context of when the error or oversight was discovered. Three days after the event cannot, in all reasonableness, be seen as not prompt. Unfortunately, we do not have the learned Master's reasons why she may not have accepted this timeline. It appears that the learned Master must have considered another timeline, leading to her conclusion that the application was not prompt. This was an erroneous application of the law to the facts before her.

[47] As indicated in the cases, once a decision is made that the application was not made promptly in the context of the circumstances before the court, the application must fail. The learned Master was not required to further assess the other requirements of rule 26.8 of the CPR after her conclusion that the application was not made promptly.

[48] This court cannot make that assessment as the whole file and history of the matter is not before us. We note, for example, references in the submissions to a trial date in 2027 and other court orders, which are not before us.

[49] In my view, the appeal ought to be allowed, and the matter remitted to the Supreme Court for a rehearing of the amended notice of application for relief from sanctions and pretrial review by another Master of the court. This is a matter in which I see no reason to depart from the general rule that costs follow the event.

[50] I thank counsel for the other cases relied on. However, the ones referred to above were the most relevant and helpful.

LAING JA

[51] I, too, have read the draft judgment of Foster-Pusey JA. I agree with her reasoning and conclusion.

F WILLIAMS JA

ORDER

1. The appeal is allowed.

2. Order 3 of the orders of Master R Harris, made on 11 June 2024, refusing the appellant's application for relief from sanctions, is set aside.

3. The matter is remitted to the Supreme Court for a rehearing of the amended notice of application for relief from sanctions and pretrial review before a

Master other than Master R Harris on a date to be fixed by the Registrar after consultation with the parties.

4. Costs of the appeal to the appellant to be agreed or taxed.